Supreme Court, U.S.
FILED
APR 8 1998
CLERK

No. 97-1456

In The

Supreme Court of the United States

October Term, 1997

DUARD BOK, M.D.,

Petitioner,

vs.

MUTUAL ASSURANCE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

W. STANCIL STARNES
Counsel of Record
ASHLEY E. WATKINS
STARNES & ATCHISON LLP
Attorneys for Respondent
Seventh Floor, Brookwood Place
P.O. Box 598512
Birmingham, Alabama 35259-8512
(205) 868-6000

145781

(800) 274-3321 • (800) 359-6859
A DIVISION OF COUNSEL PRESS

Lutz Appellate Services, inc.

QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals correctly concluded that Petitioner does not have a private right of action under the Health Care Quality Improvement Act, and that the case was therefore due to be dismissed.

STATEMENT PURSUANT TO RULE 29.6

This brief opposing the Petition for Writ of Certiorari is filed on behalf of Mutual Assurance, Inc. Its parent company is Medical Assurance, Inc. Mutual Assurance, Inc. has no nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

This proceeding stems from a case originally filed in the United States District Court for the Middle District of Alabama on September 11, 1995. Petitioner Duard Bok filed a Complaint for declaratory and injunctive relief. He based his claim on an alleged violation of the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101, *et seq.*

Respondent Mutual Assurance, Inc. filed a Motion to Dismiss on October 2, 1995. As grounds for the Motion, Mutual Assurance argued that the Health Care Quality Improvement Act did not provide the Petitioner with a private right of action and thus did not provide the court with jurisdiction over the matter.

On February 22, 1996, the district court issued a judgment and memorandum opinion granting the Respondent's motion to dismiss based on the fact that the HCQIA did not provide the Petitioner with a private cause of action, and that therefore the court lacked subject matter jurisdiction over the case.

Petitioner Bok appealed this holding to the Eleventh Circuit Court of Appeals. On August 15, 1997, the Eleventh Circuit affirmed the lower court's holding, finding that Dr. Bok did not have a private right of action under the HCQIA. Petitioner then requested a rehearing and rehearing en banc, and these petitions were denied on December 12, 1997.

REASONS FOR DENYING THE WRIT

1. Numerous courts addressing the issue have held that the Health Care Quality Improvement Act provides no private right of action for a physician in Dr. Bok's position. The district court and Eleventh Circuit were properly presented with only

this narrow issue in the instant proceeding, and both reached the same conclusion. Petitioner seeks to have this Court create a private right of action in a piece of legislation that does not contain such a right.

2. There is no compelling reason to grant this petition. None of the reasons set forth in Supreme Court Rule 10 that would justify a grant of a Petition for Writ of Certiorari is present in the instant case. There is no conflict among the circuit courts. No state court of last resort has decided this issue in a manner which conflicts with other decisions.

Courts addressing the issue have uniformly held that the HCQIA does not provide a private right of action. The Eleventh Circuit's decision does not conflict with decisions of other courts of last resort. *See Hancock v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 F.3d 373 (10th Cir. 1994); *Rogers v. Columbia/HCA of Cent. La., Inc.*, 971 F. Supp. 229 (W.D. La. 1997); *Doe v. United States Dep't of Health and Human Serv.*, 871 F. Supp. 808 (E.D. Pa. 1994), *aff'd*, 66 F.3d 310 (3d Cir. 1995); *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991); *Caine v. Hardy*, 715 F. Supp. 166 (S.D. Miss. 1989).

3. None of the reasons for granting the petition as listed by Petitioner would serve as a proper basis for review by this court. Each of the reasons proffered by Petitioner will be addressed separately:

(a) Petitioner claims that the HCQIA has received relatively little judicial consideration in the dozen years since it was passed. However, no fewer than the five courts noted above have considered the precise issue raised by Petitioner, and countless other courts have addressed other parts of the HCQIA since it was enacted.

(b) Petitioner claims that the circuits are divided as to whether the HCQIA affords a physician a private right of action. Tellingly, Petitioner provides no case law to support his assertion. Indeed, he cites only two cases on the topic. First, Petitioner writes that in *Pagano v. Oroville Hosp.*, 145 F.R.D. 683 (E.D. Cal. 1993), the court "was evidently of the belief that there is an implied right of action to require a health care entity to observe the HCQIA's peer review due process provisions." A review of the case reveals that while the case mentioned the HCQIA, the issue presented in the case at bar was not before the California district court. Instead, the court was asked to consider whether the HCQIA provided immunity for the misuse of the peer review process, and whether the Act precluded discovery of documents related to peer review activities. However, the claim at issue in *Pagano* was brought under the Sherman Act, not as a cause of action under the HCQIA. Therefore, *Pagano* does not support Petitioner's position.

Similarly, Petitioner claims that *Stevinson v. Howley*, 99 F.3d 1131 (4th Cir. 1996) is a case which "suggests" that the Fourth Circuit supports an implied right of action under the HCQIA. Again, that issue was never before the *Stevinson* court, and the opinion (which is an unpublished disposition) states that the basis of the suit was an allegation of intentional interference with the doctor-patient relationship. The HCQIA was not implicated until the plaintiffs' claim was dismissed and the defendant doctors sought attorney's fees pursuant to the HCQIA. The case does not hold, suggest or imply that the HCQIA provides a physician with a private right of action.

(c) Petitioner contends that the Eleventh Circuit misunderstood the fundamental purpose of the HCQIA. This case involves only the narrow issue of whether the Act provides the Petitioner with a private right of action. Such a determination

can be made with reference only to the wording of the statute and the guidelines set forth in this Court's decision in *Cort v. Ash*, 422 U.S. 66 (1975), without any consideration of the extraneous factors Petitioners suggests the Court should consider.

This case presents facts similar to those in *Hancock v. Blue Cross & Blue Shield of Kansas, Inc.*, 21 F.3d 373 (10th Cir. 1994). Like the plaintiff in *Hancock*, Plaintiff/Petitioner Bok attempted to base his suit on a claim of federal question jurisdiction under the HCQIA. As in that case, the dismissal of his case is due to be affirmed based on the fact that the Health Care Quality Improvement Act provides him no private right of action in these circumstances.

Petitioner Bok attempted to construct an action around the Respondent's alleged violation of the HCQIA's due process requirements. However, the *Hancock* court noted that "the HCQIA does not *expressly* create a cause of action against a professional peer review group that has violated its due process requirements." *Hancock*, 21 F.3d at 374, citing *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991) (emphasis added). Thus, if Petitioner is to base his suit on a violation of the HCQIA, he must establish that the legislation *implies* a private right of action in his favor. He is unable to meet this burden.

The case of *Goldsmith v. Harding Hosp., Inc.*, 762 F. Supp. 187 (S.D. Ohio 1991) addressed the question of whether a private right of action may be implied from the HCQIA. The court noted that in *Cort v. Ash*, 422 U.S. 66 (1975), the Supreme Court established four factors that must be considered when assessing whether a private right of action is implied in a statute:

> 1) whether the plaintiff is a member of the class for whose special benefit the statute was enacted;

> 2) whether there is any indication of legislative intent, explicit or implicit, to create or deny a remedy;
>
> 3) whether it would be consistent with the underlying purposes of the legislative scheme to imply a remedy; and
>
> 4) whether the cause of action is one traditionally relegated to state law in an area basically the concern of states, so that it would be inappropriate to infer a cause of action based solely on federal law.

Id. at 188. The *Goldsmith* court conducted a *Cort* analysis of the same provision of the HCQIA that is at issue in the instant case, and identified several factors that support the conclusion that the HCQIA does not provide a physician with a private cause of action based on a "peer review" proceeding.

First, the court found that the chief beneficiaries of the statute are the professional review bodies that are immune from liability for the results of appropriately conducted peer review proceedings. *Id.* Second, a review of the statute's legislative history revealed no indication that Congress intended to create a cause of action for physicians seeking to compel compliance with the Act. *Id.* at 189. Third, implying a remedy for physicians in this situation would be inconsistent with the overall intent of the Act, which was meant to shield peer review participants from the threat of litigation, not to add an additional potential cause of action against them. *Id.* Finally, the court was satisfied that the issue was one more properly the subject of a state law proceeding. *Id.* at 190.

Other courts addressing this topic have reached the same conclusion. *See Hancock v. Blue Cross & Blue Shield of Kansas,*

Inc., 21 F.3d 373 (10th Cir. 1994); *Doe v. United States Dep't of Health and Human Serv.*, 871 F. Supp. 808 (E.D. Pa. 1994), *aff'd*, 66 F.3d 310 (3d Cir. 1995); *Caine v. Hardy*, 715 F. Supp. 166 (S.D. Miss. 1989). Petitioner admits in his Opening Brief that these decisions exist, and he fails to cite a single case from any court in the country which has found that the HCQIA provides, expressly or by implication, a private right of action in these circumstances. Indeed, no such decision exists.

CONCLUSION

The Petition for Writ of Certiorari should be denied because the case was properly decided based on a careful reading of the Health Care Quality Improvement Act. The Petitioner's objections to the lower courts' decision on the issue does not raise a federal question appropriate for review by this Court. The lower courts involved in the instant case, as well as all courts in the country which have addressed the issue, have been in agreement that the HCQIA does not provide a private right of action which may serve as an independent basis for a lawsuit. Accordingly, Respondent Mutual Assurance, Inc. respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

W. STANCIL STARNES
Counsel of Record
ASHLEY E. WATKINS
STARNES & ATCHISON LLP
Attorneys for Respondent
Seventh Floor, Brookwood Place
P.O. Box 598512
Birmingham, Alabama 35259-8512
(205) 868-6000